

A SHIELD OF DISADVANTAGE: LEGAL ENTITY STATUS WITHIN GUARDIAN-ADOLESCENT ENTREPRENEURIAL VENTURES

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I. INTRODUCTION

“Entrepreneurship is the recognition of an opportunity to create value, and the process of acting on this opportunity, whether or not it involves the formation of a new entity.”¹ According to the Global Entrepreneurship Monitor,² entrepreneurship within the United States has grown over the past several years, with thirteen percent of adults involved in entrepreneurship in 2012. Within this entrepreneurial boom, there are increased instances of youth or adolescent entrepreneurial activity. These facts give rise to questions regarding the legal barriers that limit economic activity by minors³ (“adolescents”). This article explores several legal limitations placed on adolescent entrepreneurs. Particularly, it examines the legal business status that the adolescent assumes when undertaking an entrepreneurial activity alone or in concert with others and the unique legal treatment of the business activity when the adolescent involves a parent or

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¹ Ulrich Schoof, *Stimulating Youth Entrepreneurship: Barriers and Incentives to Enterprise Start-ups by Young People* 7 (Int’l. Labour Office, Working Paper No. 76, 2006) (quoting the original definition of entrepreneurship used within the, AUSTL. GOV. DEP’T. OF FAMILY & CMTY. SERVS., YOUTH ENTREPRENEURSHIP SCOPING PAPER (2003)) (internal quotations omitted).

² DONNA J. KELLEY ET AL., 2012 U.S. REPORT, GLOBAL ENTREPRENEURSHIP MONITOR (2012).

³ The words “minor” and “adolescent” are used synonymously to refer to an individual that has not reached the legal age of majority within the state or jurisdiction in which he or she carries on a business activity. See BLACK’S LAW DICTIONARY 1011 (7th ed. 1999) [hereinafter BLACK’S] (defining “Minor” as “[a] person who has not reached full legal age; a child or juvenile”). Further, “emancipated minor” is defined as a “minor who is self-supporting and independent of parental control, [usually] as a result of a court order.” *Id.*; see also MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 27–28 (LexisNexis, 3d ed. 2009) (examining the concept of emancipation).

guardian (“guardian”)⁴ as third-party facilitator. This article illuminates multiple legal inconsistencies that arise when applying the law of business entities to the adolescent entrepreneurial undertaking. Finally, it proposes that the adolescent-guardian, entrepreneurial relationship may constitute a default partnership entity status. Interpreting the relationship as a partnership entails a dual agency relationship between the adolescent, guardian and business venture, which provides a structure for attributing rights and accountability (potential liability) to the guardian and adolescent.

II. EXAMINING THE ROLE OF ADOLESCENT BUSINESS VENTURES

Within the United States, the population generally has a positive attitude toward entrepreneurship,⁵ with a majority of individuals desiring to be self-employed.⁶ In a 2008 U.S. Census Bureau survey, there were approximately twenty-two million sole proprietorships within the United States.⁷ Unfortunately, there is a general lack of reliable data on the frequency or level of entrepreneurship by adolescents throughout the world.⁸ Most statistical references measure entrepreneurial activity by individuals beginning at the age of eighteen,⁹ which leaves a question as to the level of entrepreneurship among adolescents. The favorable attitude toward entrepreneurship, however, is equally strong among adolescents. For example, sixty-nine percent of high school students, a strong percentage of the applicable adolescent entrepreneur demographic,¹⁰ want to be entrepreneurs.¹¹ This inclination continues within young adults—a

⁴ “Guardian” refers to either the parent or legally appointed guardian. The distinction between the guardian-ward and parent-child relationship is discussed herein.

⁵ See generally Scott Loveridge et al., *Assessing Regional Attitudes About Entrepreneurship*, 42(3) J. REGIONAL ANALYSIS & POL’Y, 210 (2012).

⁶ See TAYLOR NELSON SOFRES, FLASH EUROBAROMETER 160

“ENTREPRENEURSHIP” 4 (2004).

⁷ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 491 tbl.744 (2012).

⁸ Schoof, *supra* note 1, at 13. “Unfortunately, there remains a clear lack of concrete data on youth participation in entrepreneurial-related activities. Regarding the complex definition of entrepreneurship, the assessment of entrepreneurial activity seems to be very difficult. Moreover, studies measuring entrepreneurship often do not provide an appropriate breakdown of these data by age.” *Id.*

⁹ See, e.g., Zoltan J. Acs et al., *2004 Executive Report*, 2004 GLOBAL ENTREPRENEURSHIP MONITOR 26 fig.6 (2004).

¹⁰ See WILLIAM B. WALSTAD & MARILYN L. KOURILSKY, SEEDS OF SUCCESS: ENTREPRENEURSHIP AND YOUTH 15 (1999); see also FRANCIS CHIGUNTA, YOUTH ENTREPRENEURSHIP: MEETING THE KEY POLICY CHALLENGES 7–8 (2002) (proposing a broad categorization into transitional phases). The first phase regards pre-entrepreneurs in the age of 15–19 years. *Id.* This is the formative stage, as these younger adolescents are often in transition into the workforce. *Id.*

¹¹ WALSTAD & KOURILSKY, *supra* note 10, at 15. In 1999, Walstad and Kourilsky researched attitudes toward entrepreneurship amongst fourteen-through-nineteen

significant occurrence through the world.¹² An important factor in comparing world entrepreneurship levels is to account for entrepreneurship by necessity, as opposed to voluntary or opportunity-based entrepreneurship;¹³ whereas the positive attitude of U.S. high school

year olds in the United States. *See generally id.* They found nearly seventy percent of their respondents want to control their own destinies by becoming entrepreneurs. *Id.* at 21. Many of the same teens say they know little about how to become their own boss. *See id.* at 23. But, if given the choice, a majority of youth would rather be the owner of a small business than the manager of a large corporation. *Id.* at 33; *see also* WILLIAM B. WALSTAD & MARILYN L. KOURILSKY, GALLUP ORG., INC. & NAT'L CTR. FOR RES. IN ECON. EDU., ENTREPRENEURSHIP AND SMALL BUSINESS IN THE UNITED STATES: A GALLUP SURVEY REPORT ON THE VIEWS OF THE GENERAL PUBLIC, HIGH SCHOOL STUDENTS, AND SMALL BUSINESS OWNERS AND MANAGERS (1994); *see also* JUNIOR ACHIEVEMENT USA & THE NAT'L CHAMBER FOUND., THE FREE ENTERPRISE NATIONAL SURVEY: VIEWPOINTS FROM U.S. HIGH SCHOOL JUNIORS 3 (2011) (finding that sixty-four percent of high school juniors have the desire to own their own business one day).

¹² Schoof, *supra* note 1, at 14.

GEM data of 34 countries shows that young individuals (aged between 18 and 34) are actively involved in entrepreneurship in every country regardless of the level of GDP per capita (Figure 2), but the levels of activity by age groups differ significantly across countries with different income levels. Low-income countries (those with a per capita GDP up to \$10,000) have the highest levels of entrepreneurial activity for all age groups. In high-income countries (those with a per capita GDP over \$25,000), entrepreneurial activity is higher for all age groups than in the middle-income-countries. It also becomes obvious that the cohort of younger adults (25-34 years) is the most active age group in each income category, but especially in high-income countries. The group of young people (18-25 years) is less involved in entrepreneurial activity, particularly in high-income countries, where adults between 45 and 54 are more involved.

Id.

¹³ *Id.* at 11-12 (citations omitted).

The Global Entrepreneurship Monitor (GEM) study distinguishes between opportunity-motivated entrepreneurship and necessity-motivated entrepreneurship. Entrepreneurship is driven by economic necessity when there is no other alternative for income generation or making a living. According to GEM study, necessity-driven entrepreneurship levels in a country is associated with factors like low tax revenue as a percentage of GDP, lower levels of participation in both secondary and tertiary education and high levels of income disparity and low levels of social security. That is why especially youth in developing and low-income countries tend to engage in business out of economic necessity (e.g. lack of employment opportunities, need to supplement household income and poverty).

Id.

students towards entrepreneurship appears to indicate an orientation toward opportunity-based entrepreneurship.

The current economic system provides a great deal of potential for increased entrepreneurial activity by adolescents and young adults.¹⁴ The importance of entrepreneurship in business and regional development has been the subject of considerable study since the early twentieth century.¹⁵ In general, introducing entrepreneurship in a given area can further economic development.¹⁶ This includes promoting adolescent and young adult entrepreneurship.¹⁷ Following the financial crisis of 2007, young adults throughout the world faced a disproportionate level of unemployment.¹⁸ In 2012, only 45.7 percent of young adults (aged eighteen to twenty-four) in the United States were employed—the lowest rate since the government began keeping track in 1948.¹⁹ In the same year, approximately twenty-

¹⁴ Rachel Chambers & Anna Lake, *Youth Business International: Bridging the Gap Between Unemployment and Self-employment for Disadvantaged Youth 1* (Int'l Labour Office, Skills Working Paper No. 3, 2002), available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_104020.pdf (“At least 20 per cent of young people have the potential to become entrepreneurs and less than 5 per cent do.”).

¹⁵ See, e.g., JOSEPH A. SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT* (Redvers Opie trans., Harvard University Press 1936) (1934).

¹⁶ See Stephan J. Goetz et al., *Evaluating U.S. Rural Entrepreneurship Policy*, 40 J. REGIONAL ANALYSIS & POL’Y 20, 20–33 (2010). See generally ZOLTAN J. ACS & CATHERINE ARMINGTON, *ENTREPRENEURSHIP, GEOGRAPHY, AND AMERICAN ECONOMIC GROWTH* (2006).

¹⁷ Schoof, *supra* note 1, at 3 (citing CHIGUNTA, *supra* note 10).

Chigunta (2002) sums up a number of reasons for the importance of promoting youth entrepreneurship:

- Creating employment opportunities for self-employed youth as well as the other young people they employ;
- Bringing alienated and marginalized youth back into the economic mainstream and giving them a sense of meaning and belonging;
- Helping address some of the socio-psychological problems and delinquency that arises from joblessness;
- Helping youth develop new skills and experiences that can then be applied to other challenges in life;
- Promoting innovation and resilience in youth;
- Promoting the revitalization of the local community by providing valuable goods and services;□
- Capitalising on the fact that young entrepreneurs may be particularly responsive to new economic opportunities and trends.

Id.

¹⁸ See Jenny Marlar, *Worldwide, Young Adults Twice as Likely to Be Unemployed*, GALLUP (Apr. 27, 2011), <http://www.gallup.com/poll/147281/worldwide-young-adults-twice-likely-unemployed.aspx>.

¹⁹ PEW RESEARCH CTR., *YOUNG, UNDEREMPLOYED AND OPTIMISTIC: COMING OF AGE, SLOWLY, IN A TOUGH ECONOMY* 6 (2012).

three percent of young adults started businesses, fifteen percent of which were started while individuals were in college.²⁰ Technology or online businesses are an increasingly important portion of the ventures begun by adolescents.²¹ Consistent with this trend, over the past two decades the government has undertaken considerable efforts to promote entrepreneurship among youths in the United States.²² This policy orientation lays the groundwork for developing a legal approach to entrepreneurial practice that facilitates adolescent activity.

A. Legal Limitations on an Adolescent When Forming a Startup Venture

The above discussion demonstrates the relevance of entrepreneurship and the frequency of adolescent entrepreneurial activity within the United States. These facts make obvious the importance of understanding and further developing the legal framework under which an adolescent may carry on a business activity.

1. Historical Background and Limitations

Adolescents face a litany of challenges in entering or contributing to the U.S. workforce.²³ Despite the need and relevant history of child labor within the United States,²⁴ federal and state child labor standards have developed to place limits on the ability of adolescents to work for others.²⁵

²⁰ YOUNG ENTREPRENEUR COUNCIL, *FIX YOUNG AMERICA: HOW TO REBUILD OUR ECONOMY AND PUT YOUNG AMERICANS BACK TO WORK (FOR GOOD)* (2012) (citing a 2011 YEC/Buzz Marketing Group survey, YEC and Buzz Marketing Group's annual youth entrepreneurship survey of over 1600 American males and females ages sixteen to thirty-nine).

²¹ See Karsten Strauss, *Teenage Millionaire Entrepreneurs*, FORBES (June 7, 2013, 2:56 PM), <http://www.forbes.com/sites/karstenstrauss/2013/06/07/teenage-millionaire-entrepreneurs/> (listing influential teenage entrepreneurs—one who created a multi-million dollar technology business and another who grew his online apparel business to one million in sales).

²² See generally Teresa A. Daniel & Calvin A. Kent, *An Assessment of Youth Entrepreneurship Programs in the United States*, 20 J. PRIV. ENTERPRISE 125 (2005) (providing examples of efforts to promote adolescent entrepreneurship).

²³ See V. Nathaniel Ang, *Teenage Employment Emancipation and the Law*, 9 U. PA. J. LAB. & EMP. L. 389, 389–90 (2006).

²⁴ See generally Seymour H. Moskowitz, *Child Labor in America: History's Horror, Today's Tragedy*, 45 CLEARINGHOUSE REV. 93 (2011).

²⁵ See, e.g., Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2006). Child labor provisions of the Fair Labor Standards Act of 1938 (FLSA) outlaw “any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.” *Id.* § 212(c). The FLSA defines “oppressive child labor” to mean employment of any child under 18 in hazardous occupations, and of any child under 16 whose employer is someone other than “a parent . . . employing his own child or a child in his custody” in any occupation. *Id.* § 203(l). See generally

Irrespective of the economic consequence or the infringement on the adolescent's autonomy, such laws exist with the purpose of protecting children from exploitation by employers.²⁶ Throughout the history of the United States, adolescents worked within family businesses, such as family farms.²⁷ The industrial revolution laid the path for new levels of adolescent involvement within the labor market.²⁸ Against the backdrop of economic prosperity, a general dichotomy in the law governing adolescent labor developed between adolescents working for third-party employers and those working for their parents or legal guardians.²⁹ In the haste to protect the interest of the child, exceptions were included within statutory and common laws, shifting the burden of protecting the interest of the adolescent worker from the state back to the parents or guardians.³⁰

The development of child labor standards left open and unregulated a bastion of potential economic productivity—the adolescent entrepreneur.³¹ This phenomenon has become increasingly apparent during

Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22 (1978); see also 29 U.S.C. § 212.

²⁶ See generally John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 464 (1939).

²⁷ See Megan McGinnis, *Child Farm Labor Under the Fair Labor Standards Act*, 20 KAN. J.L. & PUB. POL'Y 155, 157 (2010).

²⁸ See generally Sara Horrell & Jane Humphries, "The Exploitation of Little Children": *Child Labor and the Family Economy in the Industrial Revolution*, 32 EXPLORATIONS ECON. HIST. 485 (1995).

We found that in early industrialization the number of children working, and the number working in factories both increased, while the age at which children started work decreased. This last effect is related to changes in household structure. Older children were gaining independence earlier, leaving younger siblings to augment family incomes.

Id. at 485.

²⁹ See Davin C. Curtiss, *The Fair Labor Standards Act and Child Labor in Agriculture*, 20 J. CORP. L. 303, 312–15 (1994) (explaining the common exemptions for adolescents under the FLSA).

³⁰ Katharine Du Pre Lumpkin, *The Child Labor Provisions of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 391, 393 (1939).

There are several general exemptions from the Act. Besides the clause in Section 3(1) exempting children working for parent or guardian, Section 13(c) exempts children employed in agriculture "while not legally required to attend school," and also children employed as actors in motion pictures or theatrical productions. These exemptions are in addition to the sweeping exclusion of child laborers engaged in occupations other than those producing for interstate commerce.

Id.

³¹ See generally James J. Heckman & Dimitriy V. Masterov, *The Productivity Argument for Investing in Young Children*, 29 REV. OF AGRIC. ECON. 446, 446 (2007) (making the case for the economic value of investing in the development of

the past decade with the increased focus on adolescent-led, entrepreneurial ventures.³² At present, no state or federal law intentionally forbids or attempts to discourage adolescent entrepreneurial activity.³³ The concern over exploitation of the adolescent is, or is perceived to be, less substantial when the adolescent enters into the business arena without the involvement of third-party benefactors. Intention aside, the aspiring adolescent entrepreneur soon encounters equally daunting statutory and common law barriers that impact the legal ability of the adolescent in undertaking or carrying on a business activity.³⁴

2. *Characterization of Decision-making Capacity and Ability to Contract*

The mental competency of an adolescent is the subject of much research.³⁵ Modern legal doctrine, in many scenarios, characterizes an adolescent as mentally incompetent or incapable of comprehending or

minor children). The study argues that early investment in education or personal support produces general economic value. *Id.*

³² See GALLUP & OPERATION HOPE, THE 2012 GALLUP-HOPE INDEX (2012). There are more than fifty million kids in grades K–12 in the United States and thirty million kids in middle and high school. *Id.* A Gallup study showed that seventy-seven percent of students in grades 5–12 said that they want to be their own boss and forty-five percent plan to start their own business. *Id.* When we asked the same group if they believed they would “invent something that changes the world,” forty-two percent said “yes.” *Id.* at 10. There is an enormous amount of economic startup energy in our kids, enough for America to re-win the world’s markets and generate new great jobs. The kids have everything we need, but adults are not giving them the chance to succeed. When Gallup asked these kids if they were currently interning with a local business, seven percent said “yes.” *Id.* at 10. So there are about twenty-three million kids in an entrepreneurial state of mind, but many of them are not getting the attention they need to become entrepreneurs. However, the research also shows that if we can move that seven percent up to twenty-five percent, we can change the world.

³³ See Dorcas R. Gilmore, *Youth Entrepreneurship Legal Services: A Model for Helping Youths Create Their Own Jobs*, 43 CLEARINGHOUSE REV. J. POV. L. & POL’Y 37, 39–42 (2009) (regarding the importance of legal services for youth as an entrepreneurship development strategy). It notes initiatives to support adolescent entrepreneurs by providing legal services to manage the generally applicable legal barriers faced by all entrepreneurs. *Id.*

³⁴ See *id.*; see generally Dorcas R. Gilmore, *Expanding Opportunities for Low-Income Youth: Making Space for Youth Entrepreneurship Legal Services*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 321, 326 (2009) (proposing a model for providing legal services to low-income youths as a manner of promoting entrepreneurship).

³⁵ See Gary B. Melton, *Children’s Competence to Consent: a Problem in Law and Social Science*, in CHILDREN’S COMPETENCE TO CONSENT 1, 5 (Melton et al. eds., 1983) (discussing the inability of the minor child to make personal decisions); see generally Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & CIV. RTS. L. REV. 321 (2003) (giving an analysis of capacity and decision-making).

making rational decisions.³⁶ These laws are based on prior scientific studies finding that adolescents do not have fully developed brains for decision-making, responsibility and risk assessment.³⁷ This attributed veil of ignorance exists until the adolescent reaches the arbitrary age of capacity as determined by the governing legal body³⁸ or judicial proceeding.³⁹ Consistent with the intention to protect the adolescent's interest, the adolescent's incapacity to make rational decisions springs from a perceived inability to appreciate potential consequences or to recognize the potential harm associated with a given course of action.⁴⁰ Based upon these perceptions, statutory and common laws protect the adolescent from incurring certain obligations and from being legally bound by agreements resulting from their actions or decisions.⁴¹

The most apparent legal barrier to the adolescent's ability to undertake an entrepreneurial activity is the limitations associated with entering into contractual relations.⁴² The concept of formalized agreement entails a promise—the compliance with which has ethical as well as legal repercussions.⁴³ The extent of the adolescent's contractual ability is limited

³⁶ Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 550 (2001) [hereinafter *Legal Construction*] (citing FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 36 (1982)). "Children also lack the capacity to make sound decisions. . . . are unable to employ reasoning and understanding sufficiently to make choices on the basis of a rational decision-making process." *Id.* See also Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607 (1992).

³⁷ See Claudia Wallis, *What Makes Teens Tick*, TIME, May 10, 2004, at 56 (reporting on research by Claudia Wallis and Kristina Dell of the National Institutes of Health Clinical Center in Bethesda, Maryland).

³⁸ See generally T. E. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22 (1960) (discussing approaches to the legal "age of majority" throughout legal history).

³⁹ See generally Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873 (1996) (exploring the legal principles employed by the judiciary when determining the mental competence of an adolescent).

⁴⁰ *Legal Construction*, *supra* note 36, at 550 ("Children's decision-making also reflects immature judgment, which may lead them to make choices that are harmful to their interests and the interests of others.").

⁴¹ See Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 277–78, 287 (2006) (explaining perceptions of adolescent's mental capacity).

⁴² This concept is known as the infancy doctrine. RICHARD A. LORD, WILLISTON ON CONTRACTS § 9.2 (4th ed. 2010) (discussing the early developments of the infancy doctrine); see generally Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47 (2012) (discussing the infancy doctrine and its effect on the contractual relationship with adolescents).

⁴³ See generally Brian H. Bix, *Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried*, 45 SUFFOLK U. L. REV. 719 (2012) (exploring Charles Fried's 1981 book, *CONTRACT AS PROMISE*, regarding contract theory). The article considers two important themes connected with Fried's project:

to agreements concerning the provision to the adolescent of basic human needs, such as food, clothing and shelter.⁴⁴ The assumed lack of mental capacity to understand the responsibility associated with entering into a legally binding agreement allows the adolescent to disaffirm, without cause or justification, any legal or contractual agreement that exceeds the scope of a basic necessity and unduly prejudices her interests.⁴⁵ Third parties, such as commercial vendors, professional practitioners and consumers, may be reluctant to enter into a commercial relationship with the adolescent due to the uncertainty of performance by or legal enforceability against the minor.⁴⁶ The adolescent, to her detriment, faces great challenge in securing relationships that facilitate a potential economic (or entrepreneurial) activity.

3. Limited Ability to Own Property or Exercise Full Control Over Assets

The issue of an adolescent's control over personal assets or earnings has been a subject of controversy since the turn of the twentieth century.⁴⁷ The ability of an adolescent to own and possess property is

first, the nature of the theoretical claims in CONTRACT AS PROMISE; and, second, the question of whether contract law, especially when this area is equated with the enforcement of promises, is in tension with John Stuart Mill's "Harm Principle." *Id.*

⁴⁴ See LORD, *supra* note 42, § 9.6; see also Larry Cunningham, *supra* note 41, at 288–89.

⁴⁵ RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981); see Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 205 (1967); see also *Legal Construction*, *supra* note 36, at 553 (noting that minors are only responsible for contracts concerning necessities). The adolescent has the ability to disaffirm any such contract by returning the good received. *Id.* Davis notes that the minority rule in many jurisdictions is that the adolescent may have to compensate for use of damage of any property or for the value of services received. *Id.*

⁴⁶ Prior research proposes that this rule allows an adolescent to unduly take advantage of third parties by consciously disaffirming a contract. See Preston & Crowther, *supra* note 42, at 47; see also Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 382–83 n.6 (2000) ("[T]his doctrine also allows the minor to take advantage of an adult, in that such a contract is void or voidable at the option of the minor.").

⁴⁷ H. R. F., *Parent and Child: Guardian and Ward: Earnings of Minor Child*, 18 CAL. L. REV. 200, 200–02 (1930) (citation omitted).

The facts of *Estate and Guardianship of Johnson* (Oct. 7, 1929), 60 Cal. App. Dec. 325, 281 Pac. 435, present but do not decide the question of the ownership of the earnings of a minor in the custody of a guardian, having been removed from his parents on the grounds of their moral unfitness. . . . the majority rule is undoubtedly to the contrary, on the ground that the guardian

governed primarily by the manner by which the adolescent comes into possession of the property. Under the common law, the guardian of an adolescent is entitled to receipt of the earnings of the adolescent⁴⁸—a transfer of value justified by the premise of compensation for the guardian's duty to provide for the care and maintenance of the adolescent.⁴⁹ This rule allows for the outcome where a guardian is able to claim ownership over any goods or funds earned by the adolescent.⁵⁰ This rule is tempered by the limitation that custodial assets of the child cannot be used to offset the guardian's obligation of care and support.⁵¹ A notable exception to the guardian's entitlement to the earnings of the adolescent is the development of Coogan Trusts⁵²—California trusts formed to protect the earnings of

ought not to be allowed to profit by his fiduciary relation to his ward (*Champlin v. Slocum* (1918) 41 R. I. 227, 103 Atl. 706; *Bass v. Cook* (1837) 4 Port. (Ala.) 390). Perhaps this element of fiduciary relation is the factor which makes it possible to establish on a sound theoretical basis the rule that the child's earnings are his own. If we say that earnings follow, not support, but custody, the unfit parents are barred from claiming the child's earnings; the guardian, because he is a mere agent of the court who is not to be allowed personally to profit by the trust imposed in him, can assert no claim. The earnings, therefore, inevitably belong to the child. Or perhaps it were better put that the rule that earnings follow custody is operative only where the child is in the custody of one of its parents; and that when the child is in the custody of a court guardian, the more general rule of wages applies, to-wit: that earnings belong to him who earns them.

Id.

⁴⁸ *Constance v. Gosnell*, 62 F. Supp. 253, 254 (W.D.S.C. 1945) ("Under the common law the father is entitled to the earnings of his minor, unemancipated children during their minority."); see generally Jillian Benbow, *Under My Roof: Parents' Rights to Children's Earnings*, 16 J. CONTEMP. LEGAL ISSUES 71 (2007).

⁴⁹ Benbow, *supra* note 48, at 71. The father's entitlement to the earnings of his minor "accrues to the father by way of compensation for the support, nurture, care, protection, maintenance and education actually afforded and furnished his children during their minority." *Constance*, 62 F. Supp. 254 n.1; see also *Kreigh v. Cogswell*, 21 P.2d 831, 832-33 (Wyo. 1933) (explaining the evolution, in both Roman and common law, of the parents' entitlement to the child's earnings and lack of entitlement to the child's property in the context of an action brought for conversion by minor children whose sheep had been taken to satisfy the debt owed by their father to the defendant).

⁵⁰ See Benbow, *supra* note 48, at 72.

⁵¹ Even where the child has a legal guardian, the guardian may not be permitted to use funds to satisfy obligations of the parent. See *In re T.L.R.*, 375 N.W.2d 54, 58 (Minn. Ct. App. 1985) (stating expenses that conservator is obligated to pay as parent for food and other items not properly payable out of funds of conservatorship); see, e.g., CAL. FAM. CODE § 771(b) (West 1999) ("[T]he earnings and accumulations of an unemancipated minor child related to a contract of a type described in Section 6750 shall remain the sole legal property of the minor child").

⁵² Note that the services or earnings of a child actor, entertainer or professional athlete are governed by CAL. FAM. CODE §§ 6750-53, an elaborate set of

adolescent actors, athletes, performers, etc., as property of the adolescent from misuse by their legal guardians.⁵³ Under California state law, a percentage of the earnings is treated similarly to the physical assets of the adolescent and held in trust for her future benefit.⁵⁴ Trusts based upon these principles are absent in most other states, leaving the common law of guardian entitlement in effect.⁵⁵

The above-stated rule regarding the earnings of an adolescent does not apply to gifts, bequests or other transfers to the adolescent.⁵⁶ State property law controls the transfer of property to adolescents within the state.⁵⁷ The Uniform Gift for Minors Act (UGMA)⁵⁸ and the Uniform Transfers to Minors Act (UTMA)⁵⁹ are model laws that provide a framework for passing assets to adolescents and for the parent or guardian

provisions referred to as the Coogan Law. See CAL. FAM. CODE § 7500(c) ("This section shall not apply to any services or earnings of an unemancipated minor child related to a contract of a type described in Section 6750.").

⁵³ Shayne J. Heller, *The Price of Celebrity: When a Child's Star-Studded Career Amounts to Nothing*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 161, 161 (1999).

A minor in the United States cannot lay claim to the money that he earns; instead, it belongs to his parents. Essentially, the parents can manage the money in whatever way they see fit -- even if that means spending and not saving the child's earnings. Later, when the child reaches the age of majority, he often finds nothing left of his money; an empty bank account is a common conclusion to a child's star-studded career.

Id. (citations omitted).

⁵⁴ The Coogan Law was enacted in 1939 to protect child actors from abusive treatment by their parents. *Id.* The modern form of the law requires court approval of a minor child's professional contracts in order for it to be binding upon the minor child. *Id.* at 164. It also requires fifteen percent of the child's earnings pursuant to that contract to be held in trust for the benefit of the child until she reaches the age of majority. *Id.* at 171. The law makes the child's parent or guardian a fiduciary with regard to the child's retained earnings. *Id.* at 166–72; see also Thom Hardin, *The Regulation of Minors' Entertainment Contracts: Effective California Law or Hollywood Grandeur?*, 19 J. JUV. L. 376, 379–86 (1998) (explaining the history of the Coogan Law prior to the 1999 amendments).

⁵⁵ See Jessica Krieg, Comment, *There's No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 429, 438–43 (2004) (stating statutes in Florida and New York protect the rights of adolescent entertainers in a manner similar to the Coogan trust); see, e.g., Child Performer and Athlete Protection Act, FLA. STAT. ANN. § 743.08 (1995); see, e.g., N.Y. ARTS & CULT. AFF. LAW § 35.03 (McKinney 2013).

⁵⁶ See *Banks v. Conant*, 96 Mass. 497, 498 (1867) (determining that the enlistment contract paid to a U.A. Army soldier was not compensation that could be claimed by the adolescent's father); see also *Kreigh v. Cogswell*, 21 P.2d 831 (Wyo. 1933) (holding that gifts to a minor by third parties could not be seized by creditors of the adolescent's father as property of the father).

⁵⁷ See, e.g., Texas Uniform Transfers to Minors Act, TEX. PROP. CODE ANN. § 141.001 (West 2013).

⁵⁸ UNIF. GIFT TO MINORS ACT, 8A U.L.A. 328 (amended 1966, superseded by UNIF. TRANSFERS TO MINORS ACT, 8A U.L.A. 176 (1983)).

⁵⁹ UNIF. TRANSFERS TO MINORS ACT, 8A U.L.A. 176.

to hold the assets for the benefit of the adolescent.⁶⁰ Nearly every state has adopted a version of the UGMA or UTMA.⁶¹ Pursuant to these statutes, a parent or court-appointed guardian will act as custodian,⁶² conservator⁶³ or trustee⁶⁴ of the adolescent's property. A conservatorship arises under state law pursuant to the transfer of assets to an adolescent.⁶⁵ The custodian is generally charged with managing the assets transferred to the minor.⁶⁶ A guardianship refers to the appointment of an individual under the relevant state probate code to care for an individual and, in some cases, manage that individual's assets and affairs.⁶⁷ In such a case, the guardian (often specifically named as custodian or conservator) manages the property of an individual in a manner similar to a trustee managing the assets of a trust and is subject to similar fiduciary duties.⁶⁸ A trustee-beneficiary relationship is

⁶⁰ Bradley R. Coppedge, *Transfers to Trust and Use of UTMA Custodial Accounts*, 23 PROB. & PROP. 34 (2009). UTMA allows a donor to transfer certain property to a "custodian" for a minor child, who is charged with the duty to manage it subject to the statutory provisions. See WILLIAM MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES § 9.1 (1988); see generally Paul M. Peterson, *Uniform Transfers to Minors Act: A Practitioner's Guide*, 1995 ARMY LAW. 3 (1995) (discussing the UGMA and UTMA as rules governing the transfer of assets to a minor child by establishing a custodial relationship with a third party).

⁶¹ *Transfers to Minors Act Summary*, UNIFORM L. COMMISSION (last visited Mar. 30, 2014), <http://www.uniformlaws.org/ActSummary.aspx?title=Transfers%20to%20Minors%20Act> ("All states and jurisdictions in the United States have adopted this Act in one of its prior forms. Some states have, also, added non-uniform amendments, expanding the scope of the Gifts to Minors Act").

⁶² UNIF. TRANSFERS TO MINORS ACT § 1(7) (defining "custodian" as one appointed under section nine of the UTMA).

⁶³ BLACK'S, *supra* note 3, at 300 (defining a "conservator" as "[a] guardian, protector, or preserver."). "Conservator is the modern equivalent of the common-law guardian. Judicial appointment and supervision are still required, but a conservator has far more flexible authority than a guardian, including the same investment powers that a trustee enjoys." *Id.* (emphasis in original). UNIF. PROBATE CODE § 5-102(1) (amended 2010) defines conservator as "a person who is appointed by a court to manage the estate of a protected person." *Id.* The term includes a limited conservator. *Id.* Under the Official Code of Georgia Annotated, a parent must qualify formally to serve as the conservator (or guardian of the property) of that parent's minor child if the amount of personal property owned by the minor exceeds \$15,000. GA. CODE ANN. § 29-3-1 (2007). For a discussion of the conservatorship of minors, see MARY F. RADFORD, *GEORGIA GUARDIANSHIP AND CONSERVATORSHIP* § 3 (2013–2014 ed. 2013).

⁶⁴ See 1 RESTATEMENT (THIRD) OF TRUSTS §§ 7–9 (2003) (outlining the scope of a trustee's responsibility for the property of another).

⁶⁵ See UNIF. TRANSFERS TO MINORS ACT § 9 (giving situations under which a custodianship arises).

⁶⁶ *Id.* ("A custodian shall: (1) take control of custodial property; (2) register or record title to custodial property if appropriate; and (3) collect, hold, manage, invest, and reinvest custodial property.").

⁶⁷ See UNIF. PROBATE CODE § 5-401 for the standard for court appointment of a guardian.

⁶⁸ *Id.* § 5-401(1).

created when an individual passes property to another person to be held in trust for the benefit of a third party.⁶⁹ The settlor of the trust's intent and the terms of the trust document govern a trust-based relationship.⁷⁰ Despite these elements of control, the trustee still owes fiduciary duties to the beneficiary and must administer the trust in the interest of the beneficiary.⁷¹ In the case of both conservatorships and trusts, there must be a competent, third-party fiduciary to control and manage the adolescent's assets.⁷² Guardianships, conservatorships and trusts are a common method for controlling the assets transferred to an adolescent.⁷³ This Article focuses on the parent-child relationship or other relationship where an adult is dually obligated to manage the person (as parent or guardian) and assets (as conservator or trustee) of the adolescent—it uses the word “guardian” to denote the individual in this position.

Neither the rule regarding receipt of compensation nor the restrictions on the transfer of assets to minors accounts for situations where an adolescent creates new property. Under such a situation, the adolescent necessarily retains an ownership interest in the product of her labor;

[A] minor, if the court determines that the minor owns money or property requiring management or protection that cannot otherwise be provided or has or may have business affairs that may be put at risk or prevented because of the minor's age, or that money is needed for support and education and that protection is necessary or desirable to obtain or provide money.

Id.

⁶⁹ UNIF. TRUST CODE § 401 (2010).

A trust may be created by:

- (1) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;
- (2) declaration by the owner of property that the owner holds identifiable property as trustee; or
- (3) exercise of a power of appointment in favor of a trustee.

Id. “This section [401] is based on Restatement (Third) of Trusts Section 10 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts Section 17 (1959).” *Id.* § 401 cmt.

⁷⁰ *Id.* § 801; see generally Benjamin D. Patterson, Note, *The Uniform Trust Code Revives the Historical Purposes of Trusts and Reiterates the Importance of the Settlor's Intent*, 43 CREIGHTON L. REV. 905 (2010) (discussing the administration of trust and the testator's intent).

⁷¹ UNIF. TRUST CODE § 802(a) (“A trustee shall administer the trust solely in the interests of the beneficiaries.”).

⁷² A parent may serve as general guardian over the child's finances during the child's minority. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 7 (2d ed. 1987). This situation creates a fiduciary duty to the child that the parent must honor. *Id.*

⁷³ See generally William M. McGovern, Jr., *Trusts, Custodianships, and Durable Powers of Attorney*, 27 REAL PROP. PROB. & TR. J. 1 (1992) (discussing the use of trust and custodianships); Peter Mosanyi, II, Comment, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIMONIAL LAW. 253 (2002).

however, the extent of the adolescent's ownership will depend upon the conditions surrounding the creation of that property.⁷⁴ Of particular concern is the legal relationship that exists between the guardian and adolescent when the newly created property is a business venture (discussed below). This Article explores that relationship within the context of default business entity principles.

4. *Inability to File for Legal Business Entity Status*

The above-mentioned alienation of third parties, either through statutory prohibitions or relational uncertainty, hinders the ability of adolescent entrepreneurs to carry on a business activity as a separate, legal entity. State governments, either unilaterally or in conjunction with the federal and local governments, regulate commercial activity taking place within their borders via a combination of statutes, regulations and ordinances.⁷⁵ These governmental bodies reduce into statutory provision a definition of what constitutes business activity for the purpose of regulation.⁷⁶ Most importantly, state statutes govern the formation of domestic business entities and the procedures that a foreign business entity must follow to conduct business activity within the state.⁷⁷ The adolescent,

⁷⁴ See, e.g., CATHERINE L. FISK, WORKING KNOWLEDGE (2009) (exploring the historical foundation of corporate ownership of employee work product); Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1 (2003) (discussing the work for hire doctrine as applied to authors).

⁷⁵ See, e.g., GA. CODE ANN. § 14-2-101 (1988).

⁷⁶ See, e.g., MICH. COMP. LAWS § 208.1105(1) (2010).

"Business activity" means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but does not include the services rendered by an employee to his or her employer or services as a director of a corporation. Although an activity of a taxpayer may be incidental to another or to other of his or her business activities, each activity shall be considered to be business engaged in within the meaning of this act.

See, e.g., *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 366 (1991) ("[T]he Michigan [single business tax] is levied against any person with 'business activity' within the State of Michigan.").

⁷⁷ See William Arthur Holby, *"Doing Business": Defining State Control Over Foreign Corporations*, 32 VAND. L. REV. 1105, 1105 (1979); see also Steven E. Keane & John R. Collins, *Changing Concepts of What Constitutes "Doing Business" by Foreign Corporations*, 42 MARQ. L. REV. 151, 151 (1958); Louis B. Marshall, *When Doing Business is Illegal*, 12 VA. L. REG. 89, 89 (1926); see generally William F. Cahill, *Jurisdiction Over Foreign Corporations and*

who has not reached the age of majority and thereby supposedly lacks mental capacity to appreciate the consequences of making these assurances to the state, cannot act as registered agent or incorporator of the business entity.⁷⁸ Fortunately, the inability to file for a business entity status does not entirely foreclose the ability to conduct business as a business entity. Some types of legal business entities, such as partnerships or joint ventures, may arise by default pursuant to the activity of the individuals involved in the economic activity.⁷⁹ The ability to carry on activity as a business entity is important as research echoes the significant benefits enjoyed by businesses assuming separate legal entity status.⁸⁰

Alienated from commercial activity by theories of capacity and contract, the adolescent entrepreneur faces a greater need for third party assistance accompanied by formidable legal restraints in obtaining that assistance. This legal conundrum begs the questions: “What is the legal status of a business activity carried on by an adolescent entrepreneur?” and “What happens when a child carries on business activity with another individual?” These questions are further complicated when the individual assisting in the adolescent’s entrepreneurial activity is the guardian of the adolescent.

III. DEFAULT LEGAL BUSINESS ENTITY STATUS

Entrepreneurial activity, by default, assumes a business entity status. In the absence of a formal legal filing with the state government, the characterization of the entrepreneur’s activity as a legal business entity leaves open for interpretation the type of resultant legal entity and fiduciary duties that apply.

A. Entrepreneurial Activity as a Sole Proprietorship

Individuals Who Carry on Business Within the Territory, 30 HARV. L. REV. 676 (1917).

⁷⁸ See, e.g., *Frequently Asked Questions*, MO. SECRETARY OF ST., <http://www.sos.mo.gov/business/corporations/faqs.asp> (“A corporation may have one or more incorporators who must be a “natural person” and at least 18 years old.”) (last visited Mar. 30, 2014).

⁷⁹ “[A] partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective intention to be ‘partners.’” UNIF. P’SHIP ACT § 202 cmt. 1 (1997). Indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so.” *Id.*; see also Larry E. Ribstein, *The Evolving Partnership* 7-17 (Ill. Law & Econ. Working Paper Series, Paper No. LE06-025, 2006) (explaining the evolution of the partnership entity).

⁸⁰ See generally Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003) (reviewing the benefits of corporate entity status and law for the conduct of business).

A business entity may be legally synonymous with or distinct from the actor or entrepreneur.⁸¹ State law recognizes that the individual business activity of an adult or adolescent, without the association of other parties or the filing for a separate legal entity status, constitutes, by default, a sole proprietorship.⁸² The sole proprietor owns any gains or profits from the business activity and is equally liable for all liabilities and obligations (including tort and contract liability) arising in the course of business.⁸³ Irrespective of the rules regarding ownership of an adolescent's property and earnings, the law does not distinguish between adults and adolescents in attributing a legal status to a business activity. The incapacity of the adolescent in the decision-making process, contractual relations and entity formation does little to prohibit the recognition of the adolescent's activity as a sole proprietorship. The adolescent's status as a sole proprietorship is, however, called into question when third parties become extensively involved in the business activity.

Individual entrepreneurs, by necessity, often seek or receive some form of assistance in their venture from third parties—such as mentors, friends or family members.⁸⁴ The need for third-party assistance is

⁸¹ A sole proprietorship is legally synonymous with the entrepreneur. MELVIN A. EISENBERG, AN INTRODUCTION TO AGENCY, PARTNERSHIPS, AND LLCs 1 (3d ed. 2000). A partnership, on the other hand, "is an entity distinct from its partners." UNIF. P'SHIP ACT § 201(a). This is what is herein referred to as "legal entity status" or the "creation of fictional but legally recognized entities or persons that are treated as having some of the attributes of natural persons." ROBERT C. CLARK, CORPORATE LAW § 1.2.3 (1986). Also, see generally Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987), and Scott E. Masten, *A Legal Basis for the Firm*, 4 J.L. ECON. & ORG. 181 (1988) (describing the legal basis for the firm as a contractual relationship and the interpretation of the firm as a separate legal form).

⁸² While this is understood, state statutes do not define a sole proprietorship. See LARRY E. RIBSTEIN & JEFFREY M. LIPSHAW, UNINCORPORATED BUSINESS ENTITIES 10, § 14.05 (3d ed. 2004) (discussing possible reasons why there are no statutes covering sole proprietorships); see 18 AM. JUR. 2D *Corporations* § 154 (1992); EISENBERG, *supra* note 81 ("A sole proprietorship is a business organization that is owned by a single individual, and is not cast in a special legal form of organization, such as a corporation, that can be utilized only by filing an organic document with the state pursuant to an authorizing statute.") ("A sole proprietorship is an unincorporated business owned by one person including large enterprises with many employees and hired managers and part-time operation in which the owner is the only person involved."); Mitchell F. Crusto, *Extending the Veil to Solo Entrepreneurs: A Limited Liability Sole Proprietorship Act (LLSP)*, 2001 COLUM. BUS. L. REV. 381, 383–84 (2001) (citing U.S. DEPT. OF COMM., STATISTICAL ABSTRACT OF THE UNITED STATES 1998, 537 (1998)).

⁸³ See generally Crusto, *supra* note 82 (analyzing the issues relative to sole proprietors' exposure to business liabilities and presenting a case for a limited liability sole proprietorship statute).

⁸⁴ See generally Michael Harvey & Rodney Evans, *Forgotten Sources of Capital for the Family-Owned Business*, 8 FAM. BUS. REV. 159 (1995).

particularly evident for adolescent entrepreneurs who are generally more likely to associate or co-found entrepreneurial ventures.⁸⁵ These third parties provide knowledge and resources, particularly in forming the business and carrying on a business activity.⁸⁶ For example, in a traditional business, the entrepreneur may depend on a parent or guardian in forming a legal entity, in establishing a bank account or payment facility, in contracting for the purchase of services, supplies or inventory, or in planning the business (such as developing a product or service model). The prevalence of technology or internet businesses necessitates a specific level of third-party assistance. For example, facilitating the adolescent entrepreneur may entail using the guardian's computer or other hardware,⁸⁷ licensing of particular software programs,⁸⁸ agreements with web-based services,⁸⁹ digital payments,⁹⁰ internet connectivity⁹¹ and in addition to the payment of utilities, living space or other resources of their guardian. These requirements are common in businesses like computer gaming, mobile application development, software development and commercial sales sites, which are popular forms of adolescent-owned businesses.⁹² In either event, the legally necessitated reliance on a third-party adult (generally, parents or guardians) often leads to inordinate amounts of control by the third party that exceed the typical co-management, partnership or investor

⁸⁵ See William Foster & Karen Jensen, *Co-Creating New Ventures: Attraction, Search, and Uncertainty In Founding Partnership Formation*, 30 FRONTIERS OF ENTREPRENEURSHIP RES. 1, 1 (2010).

⁸⁶ See *id.*

⁸⁷ See generally Peter S. Davis & Paula D. Harveston, *Internationalization and Organizational Growth: The Impact of Internet Usage and Technology Involvement Among Entrepreneur-led Family Businesses*, 13 FAM. BUS. REV. 107 (2000) (for a discussion of the importance of internet and technology innovations in the entrepreneurial family venture).

⁸⁸ See Michael A. Cusumano, *The Business of Software: What Every Manager, Programmer, and Entrepreneur Must Know to Thrive and Survive in Good Times and Bad*, PUBLISHERS WKLY., Jan. 26, 2004, at 240–41 (discussing the importance of many computer software programs to the success of entrepreneurial ventures).

⁸⁹ See generally Judith Redoli et al., *A Model for the Assessment and Development of Internet-based Information and Communication Services in Small and Medium Enterprises*, 28 TECHNOVATION 424 (2008) (discussing the importance of particular communication-based internet services); see, e.g., Shane Robinson, *Free Mobile Apps Every Entrepreneur Should Use*, FORBES (Nov. 9, 2012, 2:16 PM), <http://www.forbes.com/sites/shanerobinson/2012/11/09/mobile-apps-every-entrepreneur-should-have/> (explaining the utility of multiple web-service applications targeting entrepreneurs).

⁹⁰ See Amanda McCormick, *How To: Accept Payments Online*, ABOUT.COM, <http://entrepreneurs.about.com/od/gettingstarted/a/How-To-Accept-Payments-Online.htm> (last visited Mar. 30, 2013) (explaining the process for entrepreneurs accepting online payments).

⁹¹ See generally Massimo G. Colombo & Marco Delmastro, *Technology-Based Entrepreneurs: Does Internet Make a Difference?*, 16 SMALL BUS. ECON. 177 (2001) (regarding the importance of internet resources for technology entrepreneurs).

⁹² See Strauss, *supra* note 21, for examples of adolescent entrepreneurial ventures in the internet and technology space.

relationship.⁹³ Inevitably, the extent and context of the third party's involvement in the entrepreneurial process may vary. The following section explores the legal status of the entrepreneurial activity as a default partnership.

B. *Entrepreneurial Activity as a Default General Partnership*

A third party who takes part in the business activity of a sole proprietor may assume the role of employee, independent contractor, financier or partner. These relationships are often the product of negotiated legal agreements,⁹⁴ but may also arise pursuant to the acts or activity of the parties involved.⁹⁵ Of particular interest to this research is the point at which the business activity and relationship with third-party facilitators evolves into a default partnership.

Black's Law Dictionary defines a partnership as "[a] voluntary association of two or more persons who jointly own and carry on a business for profit."⁹⁶ Notably, the definition requires that the relationship be "voluntary" in nature.⁹⁷ The Uniform Partnership Act (U.P.A.) of 1997 defines a partnership more succinctly as "an association of two or more persons to carry on as co-owners a business for profit."⁹⁸ Pursuant to both definitions, a partnership arises when two or more individuals carry on activity in concert that could result in a financial profit or loss.⁹⁹ This definition focuses upon the agreement between individuals regarding the allocation of assets or resources. The U.P.A. notably omits language regarding the "voluntary" association of individuals.¹⁰⁰ The default partnership is contractual in nature and regards the intended actions of the partners and not the nature of the legal relationship of the purported partners.¹⁰¹ To form a general partnership, the partners do not have to intend to be partners; rather, the individuals must agree to devote resources toward a legal venture with the purpose of sharing profits or losses.¹⁰²

⁹³ See generally Thomas Zellweger et al., *Should I Stay or Should I go? Career Choice Intentions of Students with Family Business Background*, 26 J. BUS. VENTURING 521 (2011).

⁹⁴ See, e.g., UNIF. P'SHIP ACT § 101(7) (1997) (defining the partnership agreement).

⁹⁵ *Id.* § 101 cmt. ("The partnership agreement need not be written; it may be oral or inferred from the conduct of the parties.").

⁹⁶ BLACK'S, *supra* note 3, at 1142.

⁹⁷ *Id.*

⁹⁸ UNIF. P'SHIP ACT § 101(6).

⁹⁹ *Id.*; see also CHARLES R.T. O'KELLEY ET AL., CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS, CASES AND MATERIALS 51 (6th ed. 2010).

¹⁰⁰ UNIF. P'SHIP ACT § 101(6).

¹⁰¹ Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45, 57–58 (1993) (explaining that a partnership is viewed as essentially contractual in nature).

¹⁰² See UNIF. P'SHIP ACT § 202(a).

Applying the above definitions to the relationship between guardian and adolescent is consistent with the general rules of contract law and partnership principles. Pursuant to general contract law, any agreement imputed to the adolescent as a result of concerted economic activity with a third party may be voidable at the insistence of the adolescent if the agreement adversely affects her rights.¹⁰³ The default partnership remains voidable by the adolescent partner—an outcome that is consistent with the rights of dissolution of any general partner in an at-will, default partnership.¹⁰⁴ In any event, participation in the entrepreneurial activity is voluntary and subject to cessation by either partner.

IV. EXPLORING THE ADOLESCENT-GUARDIAN RELATIONSHIP

The default entity status of an entrepreneurial activity is important when determining the rights and accountability (obligations) that accompany the relationships therein. The following section explores the intra-business relationships within a default business entity when a guardian facilitates the adolescent entrepreneur's venture.

A. *The Parent/Guardian-Adolescent Relationship*

The parent-child and the guardian-ward relationships, while related, are distinct in the legal context. The parent-child relationship exists under the concept of parental autonomy, providing for certain constitutionally protected rights in the rearing of a child.¹⁰⁵ These rights are more extensive than those of other fiduciary relationships,¹⁰⁶ particularly those within the guardian-ward relationship.¹⁰⁷ In a guardian-ward relationship, the guardian is an individual who stands in a position of authority over the person and personal property of another.¹⁰⁸ The guardian is a court-appointed surrogate

¹⁰³ RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. a (1981); *see also* UNIF. P'SHIP ACT § 602(a), which states that "[a] partner has the power to dissociate at any time, rightfully or wrongfully, by express will pursuant to Section 601(1)"; Edge, *supra* note 45, at 205.

¹⁰⁴ *See also* UNIF. P'SHIP ACT § 101(8), defining a partnership at will as "a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking."

¹⁰⁵ *See generally* Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975 (1988) (exploring the relationship between a parent's authority in raising a child and the constitutional rights of the adolescent and parents).

¹⁰⁶ *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2401-02 (1995) (discussing various fiduciary duties).

¹⁰⁷ 39 C.J.S. *Guardian & Ward* § 1 (2003) (stating the guardian-ward relationship is fiduciary in nature).

¹⁰⁸ BLACK'S, *supra* note 3, at 712 (defining "guardian" as "[o]ne who has the legal authority and duty to care for another's person or property, [especially] because of the other's infancy, incapacity, or disability").

for the parent to act for the wellbeing of the adolescent ward.¹⁰⁹ The primary distinction is the inconsistency in the level of authority and rights of the parent of a child, as compared to those of the guardian of an adolescent ward.¹¹⁰ The extent of the rights (as well as the limitations) in the fiduciary relationship (guardian-ward or parent-child) is the subject of significant scholarly debate¹¹¹ and varies between jurisdictions. While this distinction is important to note, the distinctions between the fiduciary duties arising between the adolescent and her parent or legal guardian is outside the scope of this Article. This Article focuses on the rights or entitlement to the earnings and property of the adolescent and the accountability or potential liability of the individuals involved in the entrepreneurial undertaking. These rights and obligations are largely uniform across the parent-child and guardian-ward relationship.¹¹² The primary area of difference regards the entitlement to compensation for services rendered to the child in a guardian-ward relationship¹¹³ and the entitlement to ownership of the earnings of the minor child.¹¹⁴ As such, the parent-child and guardian-ward relationship is addressed simply as the “guardian-adolescent” relationship and the analysis below applies equally to parent-child as well as guardian-ward relationships.

B. *Uncertainty in the Role of the Guardian*

Co-founders of a business, without formal documentation altering the status of their relationship, are, by definition, default partners¹¹⁵; however, the status of an individual cofounder is unclear when the non-

¹⁰⁹ *Guardian & Ward*, *supra* note 107, § 5.

¹¹⁰ Lawrence A. Frolik, *Is a Guardian the Alter Ego of the Ward?*, 37 STETSON L. REV. 53, 54 (2007) (citing Scott & Scott, *supra* note 106, at 2401–02).

[The guardian-ward] relationship sounds very much like a parent’s duties to a minor child, except that the parent uses the parent’s money rather than the child’s money. Yet the relationship is not quite parallel because a parent has a protected sphere of action that gives the parent some degree of nonrenewable discretion over the life of the child.

Id.

¹¹¹ See, e.g., James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CALIF. L. REV. 1371 (1994) (debating the aspects of parental rights in raising and child and the duties of the parent as a potential fiduciary of the child); Scott & Scott, *supra* note 106 (addressing the role of the parent as a fiduciary of the child).

¹¹² See UNIF. PROBATE CODE § 5-207 (amended 2008) (“Requirements of a Guardian”). “Except as otherwise limited by the court, a guardian of a minor ward has the powers of a parent regarding the ward’s support, care, education, health, and welfare.” *Id.* § 5-208(a).

¹¹³ *Id.* § 5-417.

¹¹⁴ See *infra* notes 117, 130–31 in support of a parent’s entitlement to the earnings of a minor child.

¹¹⁵ See UNIF. P’SHP ACT § 101(6) (1997).

adolescent cofounder is involved in the entrepreneurial venture by virtue of his or her status as parent or guardian of the adolescent entrepreneur. In this context, the guardian is involved in the entrepreneurial venture as a result of her legal responsibility to manage and control the adolescent's assets,¹¹⁶ including assets acquired with funds earned by the adolescent.¹¹⁷ The custodial duties of the guardian necessarily implicate her within the entrepreneurial activity of the adolescent—as entrepreneurship, by definition, requires the employment of resources by the entrepreneur to create value around a product, service or idea.¹¹⁸ Charged with decision-making authority over the utilization of the adolescent's assets, the guardian must make determinations regarding the adolescent's use of her own resources in pursuit of a business activity.

While the decision-making responsibility of the guardian with regard to the adolescent and the adolescent's assets is established,¹¹⁹ this scenario ignores any relationship between the guardian and the business or business activity. Specifically, it fails to account for the rights and obligations of the guardian who assumes an active role in the entrepreneurial activity. The first step in analyzing the incumbent rights and duties of these individuals is to focus on the alternative views of this relationship. One view assumes that the business activity is a sole proprietorship of the adolescent with no regard for the role of the guardian who materially participates in the venture. This treatment of the relationship is nonsensical when the guardian acts as a facilitator and, as discussed below, receives either direct or indirect benefit or profit from the relationship. It ignores the default rule that individuals who agree to carry on an activity for a profit constitute a default partnership.¹²⁰ A second and more logical view of this relationship is that the parent or guardian becomes the custodian of the business venture and both the guardian and adolescent act as agents thereof. This interpretation recognizes the business activity as independent of the adolescent and envisions the guardian as exercising control over the business activity, as well as the physical assets or resources employed within the activity. In further support of this interpretation, it closely corresponds with the rules governing the partnership relationship

¹¹⁶ *Guardian & Ward*, *supra* note 107, § 2; see also BLACK'S, *supra* note 3, at 523 ("fiduciary duty" requires acting "in the best interests of the other person (such as the duty that one partner owes to another)").

¹¹⁷ See *Slater v. Cal. St. Auto. Ass'n*, 200 Cal. App. 2d 375, 377 (1962) (holding that the son's automobile, purchased with son's earnings, was owned by son and therefore not covered by parents' liability insurance policy because "assuming the parents' right to the military earnings of their son, the record here clearly establishes that the senior Ercegs relinquished to the son the earnings he expended for purchase, maintenance and operation of the car. . . and the automobile itself").

¹¹⁸ See generally Sharon A. Alvarez & Lowell W. Busenitz, *The Entrepreneurship of Resource-Based Theory*, 27 J. MGMT. 755 (2001).

¹¹⁹ See generally *Guardian & Ward*, *supra* note 107, for an explanation of the responsibilities of the guardian.

¹²⁰ UNIF. P'SHIP ACT § 202(a).

(where each partner acts as agent and represents the interest of the business)¹²¹ in that it implicates the rules of agency between the guardian and both the adolescent and business activity.

V. THE GUARDIAN-ADOLESCENT RELATIONSHIP IS CONSISTENT WITH PARTNERSHIP AND AGENCY PRINCIPLES

The above discussion makes obvious the inconsistency in the interpretation of the guardian-adolescent entrepreneurial relationship as a sole proprietorship when the guardian plays an integral role in the business activity. As an alternative, viewing the activity as a partnership provides a uniform interpretation of the relationship between the guardian and adolescent involved.

A. *Default Partnership Status*

As discussed above, a default partnership arises when two individuals carry on an activity in concert for a profit (or loss).¹²² Per the U.P.A.,¹²³ the characteristics of a relationship that give rise to a default partnership are: 1) concerted effort between the potential partners, and 2) an intended sharing of profits (or losses).¹²⁴ The level of entrepreneurial activity attributable to the guardian and whether that effort constitutes a concerted effort varies between businesses and is a subjective determination. Given the role of the guardian as custodian of assets,¹²⁵ there is necessarily some level of facilitation by the guardian; however, in some cases, the involvement of the guardian may go much further than the custodial duties of managing resources. For example, the guardian may provide personal resources, such as equipment, space, funds, etc., to the venture. In more extreme cases the guardian may act as surrogate for the adolescent and run the daily affairs of the business, such as contracting for the purchase or sale of material, supplies, goods or services. As a result, at some point in the development of the entrepreneurial venture, the activity of the guardian exceeds that of custodian of the adolescent's assets and takes on a role similar to that of a partner and agent of the business venture.¹²⁶

¹²¹ See *id.* § 301.

¹²² "Except as otherwise provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." *Id.* § 202(a).

¹²³ *Id.* § 1.

¹²⁴ *Id.* § 101(6).

¹²⁵ See *supra* text accompanying notes 50–54.

¹²⁶ UNIF. P'SHIP ACT § 202 cmt. 1 (2008).

As under the UPA, the attribute of co-ownership distinguishes a partnership from a mere agency relationship. A business is a series of acts directed toward an end. Ownership involves the

Once the level of facilitation by the guardian reaches the floating standard of “concerted effort,” the question of whether the adolescent-guardian, entrepreneurial relationship amounts to that of a default partnership depends upon whether the activity involves a shared profit or loss.¹²⁷ As discussed above, the guardian acts as custodian of the assets of the adolescent and employs those assets in the best interest of the adolescent.¹²⁸ The guardian also has a legal duty to provide for the care and wellbeing of the adolescent.¹²⁹ As previously mentioned, under common law, the parent has the legal right to the earnings of the adolescent¹³⁰—a right that arose to displace the financial obligations of the parent for the care and maintenance of the adolescent.¹³¹ Further, the guardian of an adolescent ward, acting as conservator of assets, is entitled to compensation for services rendered to the child¹³² and reimbursement from the child’s

power of ultimate control. To state that partners are co-owners of a business is to state that they each have the power of ultimate control. See Official Comment to UPA [of 1914] § 6(1). On the other hand, as subsection I(1) makes clear, passive co-ownership of property by itself, as distinguished from the carrying on of a business, does not establish a partnership.

Id.

¹²⁷ *Id.* § 202(3). Section 202(c)(3) states that:

[i]n determining whether a partnership is formed, the following rules apply . . . [a] person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:

- (i) of a debt by installments or otherwise;
- (ii) for services as an independent contractor or of wages or other compensation to an employee;
- (iii) of rent;
- (iv) of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;
- (v) of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or
- (vi) for the sale of the goodwill of a business or other property by installments or otherwise.

Id.

¹²⁸ See *supra* notes 106–07 (indicating the legal requirements of the guardian with regard to the assets of the adolescent).

¹²⁹ See UNIF. PROBATE CODE § 5-401.

¹³⁰ “Under the *common law* the father is entitled to the earnings of his minor, unemancipated children during their minority. This right accrues to the father by way of compensation for the support, nurture, care, protection, maintenance and education actually afforded and furnished his children during their minority.” *Constance v. Gosnell*, 62 F. Supp. 253, 254 (W.D.S.C. 1945) (citations omitted).

¹³¹ See *id.*

¹³² See UNIF. PROBATE CODE § 5-413.

funds for any money spent on the child.¹³³ These general entitlements are qualified by the rule that any funds used to purchase assets, including assets in furtherance of the business, become the property of the adolescent.¹³⁴ As such, the guardian acts as custodian of those assets and employs them for the benefit of the adolescent.¹³⁵ Despite the rule concerning earnings converted to assets, a parent's common law entitlement to earnings of the minor to offset the expenditure of personal funds equates to the sharing of profits.¹³⁶ The guardian of an adolescent ward, on the other hand, is not required to expend any personal funds in support of the adolescent.¹³⁷ Therefore, any material support or personal assets provided to the adolescent in the production of a business may give rise to a justifiable expectation to share in the profits from that activity. The question turns on whether the adolescent and guardian understood that the guardian expected to share in the profits of the activity.¹³⁸

In summary, the guardian's facilitation of the entrepreneurial activity, the control inherent in her responsibilities as custodian and the entitlement or intent to share in the earnings of the adolescent (including those of the entrepreneurial activity) meets the statutory definition of a default partnership under the U.P.A.¹³⁹

B. Dual Agency-Based Relationship

The partnership approach to the adolescent-guardian entrepreneurial relationship provides standards for the conduct of the guardian with respect to the adolescent and the business activity. The role of guardian as custodian of the adolescent's assets is a form of agency relationship.¹⁴⁰ Likewise, partners in a partnership are agents of the

¹³³ *Id.* § 5-316(b).

¹³⁴ See *Slater v. Cal. St. Auto. Ass'n*, 200 Cal. App. 2d 375, 377 (1962).

¹³⁵ *Guardian & Ward*, *supra* note 107, § 5; see also UNIF. PROBATE CODE § 5-207(a).

¹³⁶ The United States Internal Revenue Service treats the income derived from custodial property as incomes to the parent of the minor to the extent that it is used to discharge the parent's legal obligation of support. Rev. Rul. 59-357, 1959-2 C.B. 212 (1959).

¹³⁷ See UNIF. PROBATE CODE § 5-316(b).

¹³⁸ See UNIF. P'SHIP ACT § 101(6) (1997) (regarding the requirement of an intent to share profits from a concerted activity).

¹³⁹ See *id.* § 202 cmt. 1.

¹⁴⁰ Frolik, *supra* note 110, at 57-58.

Though the guardian is not the agent of the court, neither is the guardian merely an agent of the ward. That is, the guardian cannot be seen merely as a legal actor whose authority comes from the ward. Rather, the guardian has powers delegated to him or her by the court, but is expected to act according to the preferences and desires of the ward—that is, as might an agent of the ward.

business.¹⁴¹ Agency law is a well-developed body of law that manages the inherent conflicts that arise in the relationship between individuals.¹⁴² An agent within the scope of the agency relationship has the authority to act on behalf of the principal.¹⁴³ The relationship is fiduciary in nature and, consistent with the duties as custodian, requires the agent or fiduciary to act in the “best interest” of the principal.¹⁴⁴ An agency approach to the guardian-adolescent, entrepreneurial relationship is also consistent with partnership principles. In a general partnership, a partner is not the agent of the other partners in the partnership; rather, the partner serves as agent for

Id. (citations omitted); *see also* Seaboard Sur. Co. v. Boney, 761 A.2d 985, 992 (Md. 2000) (discussing how a principal has the right to control his agents, while a ward “may not select, instruct, terminate, or otherwise control his guardian”).

¹⁴¹ UNIF. P'SHIP ACT § 301(1).

Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.

Id.

¹⁴² Scott & Scott, *supra* note 106, at 2403.

Agency theory identifies two means of reducing conflicts of interest between agents and principals. Bonding encourages agents to align their interests with those of their principals, while monitoring facilitates the oversight of agents' performance to detect selfish behavior. Fiduciary law utilizes varying combinations of these mechanisms in different settings to reduce or avoid conflicts of interest. Viewed through this lens, much contemporary regulation of the parent-child relationship can be understood as serving either bonding or monitoring functions.

Id. (citation omitted).

¹⁴³ RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.” *Id.*

¹⁴⁴ Scott & Scott, *supra* note 106, at 2419.

Fiduciary relationships are a subset of agency relationships, a broad category of legal relationships in which one party undertakes to perform a service for another. A key goal in the regulation of agency relationships is to encourage the agent to serve her principal's interests as well as her own. Several characteristics of agency relationships contribute to the risk of self-interested actions.

Id.

the partnership itself.¹⁴⁵ The fiduciary duties of care and loyalty allow the partner to promote the best interest of all partners by furthering the interest of the business.¹⁴⁶ As such, the partnership interpretation of the guardian-adolescent relationship gives rise to a dual agency relationship in which the guardian serves as agent of the adolescent as well as an agent of the partnership.

The question remains: does such an interpretation meet with an equitable result for the guardian and adolescent involved? Specifically, does a partnership interpretation of the relationship as a partnership adequately distribute the rights and resulting accountability within the business relationship?

VI. FRAMEWORK FOR THE RIGHTS AND ACCOUNTABILITY WITHIN THE ENTREPRENEURIAL ACTIVITY

The argument for a partnership-based relationship between the adolescent and guardian finds support in the underlying need to account for the rights and accountability of the guardian in the context of the entrepreneurial activity. Outside of the partnership context, the adolescent lacks established rights, such as formalized control and entitlement to earnings of the business activity. Likewise, the guardian faces potential liability (though limited) for facilitating the entrepreneurial activity.¹⁴⁷ The sections below address these issues within the adolescent entrepreneurial relationship.

A. Adolescent Rights Within the Entrepreneurial Activity

As previously discussed, legal barriers affect the adolescent's ability to exercise her rights and to protect her interest in the business

¹⁴⁵ See *Guardian & Ward*, *supra* note 107, § 5.

¹⁴⁶ UNIF. P'SHIP ACT § 404 entitled "General Standards of Partner's Conduct," adopts the term "fiduciary" from UNIF. P'SHIP ACT § 21 (1914), entitled "Partner Accountable as a Fiduciary"; see also *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928) (establishing the fiduciary standards that exist in partnership).

¹⁴⁷ *Lott v. Strang*, 727 N.E.2d 407, 409 (Ill. Ct. App. 2000) (citing RESTATEMENT (SECOND) OF TORTS § 316 (1965)).

A parent is under a duty to exercise reasonable care so [as] to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent

(a) knows or has reason to know that he has the ability to control his child, and

(b) knows or should know of the necessity and opportunity for exercising such control.

Id.

activity.¹⁴⁸ These barriers are particularly evident when viewing the entrepreneurial activity as a sole proprietorship. Pursuant to this interpretation, the adolescent maintains minimal control over his or her assets and must depend upon the guardian, as custodian of the assets, for assistance in employing acquired resources in support of the business. Further, in the parent-child context, the adolescent enjoys limited rights to the earnings of the business.¹⁴⁹ With the exception of certain trust-based arrangements acknowledged by select states, the guardian may keep the earnings to offset the obligation of care and support for the adolescent¹⁵⁰ or keep the earnings as reimbursement for support supplied to the adolescent.¹⁵¹ In early stage startups, reinvestment of revenue is essential for the growth and maintenance of the business. Placing control of the business earnings with the guardian (as agent of the adolescent) effectively gives the guardian control of the business activity.¹⁵²

A partnership-based interpretation of the guardian-adolescent entrepreneurial relationship serves to protect the interest of the adolescent in the control and earnings of the partnership.¹⁵³ Under U.P.A. sections 401(f) and (g), a general partner has equal rights of authority to act in and on behalf of the business venture and equal right to the use and possession of partnership property.¹⁵⁴ This authority goes further than the limited authority of the adolescent with regard to her personal assets under the traditional custodianship scenario. Partnership rules also call for an equal

¹⁴⁸ See UNIF. P'SHIP ACT § 401(f)–(j) (stating that partners by default have equal right to management and decision-making).

¹⁴⁹ See *Constance v. Gosnell*, 62 F. Supp. 253, 254 (W.D.S.C. 1945) (finding under the common law the father is entitled to the earnings of his minor children during their minority).

¹⁵⁰ See *id.* (“This right [to the earnings of the minor child] accrues to the father by way of compensation for the support, nurture, care, protection, maintenance and education actually afforded and furnished his children during their minority.”).

¹⁵¹ UNIF. PROBATE CODE §§ 5-316(b), 5-417 (2008).

¹⁵² See UNIF. P'SHIP ACT § 202 cmt. 1.

As under the UPA, the attribute of co-ownership distinguishes a partnership from a mere agency relationship. A business is a series of acts directed toward an end. Ownership involves the power of ultimate control. To state that partners are co-owners of a business is to state that they each have the power of ultimate control.

Id.

¹⁵³ See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L. J. 387, 393 (2000).

Legal entities are distinct from natural persons, however, in that their bonding assets are, at least in part, distinct from assets owned by the firm's owners or managers, in the sense that the firm's creditors have a claim on those assets that is prior to that of the personal creditors of the firm's owners or managers.

Id.

¹⁵⁴ UNIF. P'SHIP ACT §§ 401(f), 401(g).

distribution of profits of the business entity.¹⁵⁵ That is, funds are considered those of the partnership until dispersed to partnership owners.¹⁵⁶ These funds therefore become property of the adolescent partner, as opposed to earnings or wages from employment to which the guardian may be entitled.¹⁵⁷ The guardian must hold and manage these partnership assets in the best interest of the adolescent, rather than appropriate those earnings to offset the obligation of care and maintenance of the adolescent.¹⁵⁸

Interpreting the relationship as a default partnership further allows for either partner to walk away from the venture at any time in order to protect his or her interest.¹⁵⁹ If the adolescent acts on her right to dissociate from the entrepreneurial activity, partnership rules call for an accounting of the adolescent's interest.¹⁶⁰ If the adolescent feels that the guardian is usurping power over the business or appropriating partnership assets, the adolescent may exercise her legal right to a formal accounting.¹⁶¹ This fact is important as the adolescent may feel limited in her ability to enforce her ownership rights following the rupture of the business relations due to the level of dependence upon the guardian.¹⁶² This partnership right

¹⁵⁵ "Each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits." *Id.* § 401(b).

¹⁵⁶ "A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership." *Id.* § 401(h). "Each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits." *Id.* § 401(b). "All property acquired by a partnership, by transfer or otherwise, becomes partnership property and belongs to the partnership as an entity, rather than to the individual partners." *Id.* § 203 cmt.

¹⁵⁷ "A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership." *Id.* § 401(h). In the case of a transfer to a child who is a minor, there is an additional requirement that the child "be competent to manage his own property and participate in the partnership activities in accordance with his interest in property." *See* Treas. Reg. § 1.704-1(e)(v)(2)(viii). Only a minor who demonstrates "sufficient maturity and experience to be treated by disinterested persons as competent to enter business dealings and otherwise conduct his affairs on a basis of equality with adult persons" will meet this requirement. *Id.*

¹⁵⁸ *See* Scott & Scott, *supra* note 106, at 2401; *see also* *Guardian & Ward*, *supra* note 107 (indicating the legal requirements of the guardian with regard to the assets of the adolescent).

¹⁵⁹ *See* UNIF. P'SHIP ACT §§ 601, 603, 701, 801 (recognizing the ability of the partner to dissociate from the firm without breach of duty).

¹⁶⁰ *Id.* § 807(b).

¹⁶¹ "An action for an accounting provides an adequate remedy in the event adequate records are not kept." *Id.* § 403 cmt. 1.

¹⁶² *See* Scott & Scott, *supra* note 106 (exploring the extent of a guardian's control over an adolescent ward); *see also* UNIF. PROBATE CODE § 5-208 (2008) (exploring

supplements the common law protections afforded the adolescent.¹⁶³ That is, the adolescent is entitled to a formal accounting with or without exercising any common law right of action challenging the guardian's exercise of authority over the business assets.¹⁶⁴ Such reliance could lead to inequitable and inconsistent results due to the lack of formalized rules in place to interpret the rights of the guardian and adolescent with regard to the assets of the abandoned venture.

Lastly, the dual agency obligations of the guardian provide additional legal protections that extend beyond the fiduciary duty to employ the adolescent's assets in her best interest.¹⁶⁵ In managing the partnership assets of the adolescent, the guardian must comply with the fiduciary duty of care and loyalty to the partnership.¹⁶⁶ Most importantly, the duty of loyalty requires the guardian to act fairly and avoid self-interest when dealing with partnership assets.¹⁶⁷

B. *Rights of the Guardian Within the Entrepreneurial Venture*

In a sole proprietorship, the guardian who employs his or her personal funds to facilitate a business venture, while entitled to profits of the business, likely will not be able to recupere any losses sustained.¹⁶⁸ The guardian has no claim to business assets and is not a formal creditor of the business. If the business venture fails or ceases to exist, the adolescent owns the assets of the business that remain.¹⁶⁹ For example, the adolescent would maintain ownership of any intellectual property or designs used in the business, which could have substantial residual value. Despite the

the extent of a guardian's control over an adolescent ward); *Guardian & Ward* *supra* note 107, § 2 (exploring the extent of a guardian's control over an adolescent ward); BLACK'S, *supra* note 3, at 712 ("guardian"); Dwyer, *supra* note 111, at 1373 (exploring the extent of a guardian's control over an adolescent ward); Frolik, *supra* note 110 (exploring the extent of a guardian's control over an adolescent ward). See generally McCarthy, *supra* note 105 (exploring the extent of a guardian's control over an adolescent ward).

¹⁶³ UNIF. P'SHIP ACT § 405(b). "A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business . . ." *Id.*

¹⁶⁴ See generally Alison M. Brumley, Comment, *Parental Control of a Minor's Right to Sue in Federal Court*, 58 U. CHI. L. REV. 333 (1991) (discussing the common law rights of an adolescent to bring a federal court action).

¹⁶⁵ See Slater v. Cal. St. Auto. Ass'n, 200 Cal. App. 2d 375, 375 (1962) (supporting a parent's entitlement to the earnings of a minor child); see also UNIF. PROBATE CODE § 5-401. See generally Constance v. Gosnell, 62 F. Supp. 253 (W.D.S.C. 1945) (supporting a parent's entitlement to the earnings of a minor child).

¹⁶⁶ UNIF. P'SHIP ACT § 404(a).

¹⁶⁷ See *id.* § 404(b).

¹⁶⁸ FED. R. CIV. P. 17(c)(2) (allowing for a minor to be sued via a guardian ad litem despite the fact it is unlikely the adolescent has assets sufficient to satisfy a judgment).

¹⁶⁹ See Crusto, *supra* note 82, at 386–90 for an explanation of default common law rules applicable to sole proprietorships.

outlay of resources to facilitate the entrepreneurial activity, the guardian (as custodian) cannot recuperate her losses from the adolescent's property or employ those assets for her personal benefit.¹⁷⁰ In addition to the lack of rights in the event of financial loss, the guardian faces a small degree of potential liability from supporting, facilitating or even allowing the adolescent to proceed with the entrepreneurial undertaking.¹⁷¹ This potential liability derives from theories of negligence in supervising the adolescent's activities or entrusting assets to the adolescent.¹⁷² Taken together, these facts are inequitable to the guardian and act as a general disincentive to facilitate entrepreneurial activity.

A partnership-based view of the adolescent-guardian relationship alleviates the inequity of the above situation. It provides for the right of the guardian to personally or financially benefit from the entrepreneurial activity commensurate with her facilitation.¹⁷³ Partners share in the profits and losses of the venture equally or as agreed to between the parties.¹⁷⁴ If the business is profitable, the partner would be entitled to an equitable portion of the business earnings.¹⁷⁵ This relationship provides autonomy to the guardian and adolescent in determining whether these assets are withdrawn from or reinvested in the business activity. At the conclusion of the business venture, the parties are entitled to an accounting and equitable distribution of the assets of the business.¹⁷⁶ If assets remain after satisfying business obligations, the guardian is entitled to a percentage of the business assets based upon her contribution to the business.¹⁷⁷ As a partner, the guardian is compensated for the risk involved in supporting the venture by being able to gain from the relationship; further, she is protected from

¹⁷⁰ See *Sutliff v. Sutliff*, 528 A.2d 1318, 1325 (1987) (stating that under the UGMA, a parent-custodian may be subject to surcharge and removal for using custodial funds to satisfy his own support obligations).

¹⁷¹ See, e.g., RESTATEMENT (SECOND) OF TORTS § 316 (1965).

A parent is under a duty to exercise reasonable care so as to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent:

- (a) knows or has reason to know that he has the ability to control his child, and
- (b) knows or should know of the necessity and opportunity for exercising such control.

Id.

¹⁷² See Alice B. Freer, *Parental Liability for Torts of Children*, 53 KY. L. J. 254, 255 (1965).

¹⁷³ See generally UNIF. P'SHIP ACT § 401 (1997) (enumerating a partner's rights and duties).

¹⁷⁴ *Id.* § 401(b).

¹⁷⁵ *Id.*

¹⁷⁶ See generally *id.* § 807 (detailing settlement of accounts and contributions among partners).

¹⁷⁷ *Id.* § 807(b).

suffering uncompensated loss of her contributed resources.¹⁷⁸ Lastly, once the adolescent reaches the age of majority, partnership principles allow for a smooth transition in the legal status of the activity to a traditional partnership relationship.¹⁷⁹

C. Accountability Within the Entrepreneurial Activity

A final issue of uncertainty is who and to what extent the adolescent and guardian are accountable (or liable) for the activities of the business. Within a sole proprietorship, the individual is subject to personal liability for all liabilities of the business.¹⁸⁰ This includes liability for business debt obligations and potential civil liability for harm caused to third parties. Likewise, partners in a partnership face personal liability for all business liabilities.¹⁸¹ In either event, within the entrepreneurial context, an adolescent sole proprietor or partner is likely judgment proof due to a lack of personal assets and is protected from liability beyond his or her interest in the business. The Federal Rules of Civil Procedure allow for suit against a minor; however, the minor likely has very few personal assets outside of the business activity.¹⁸² Further, any assets of the adolescent may be held in trust by the guardian (acting as trustee) and shielded from execution or attachment by creditors.¹⁸³ This situation affords the adolescent a form of limited liability and deprives an obligee or debt holder of a right of recourse.

When viewed as a sole proprietorship of the adolescent, the guardian is not subject to liability for the business debts and, in most states, is not responsible for the negligence or non-intentional, tortious conduct of the minor.¹⁸⁴ There is a degree of potential liability of the guardian for a

¹⁷⁸ *Id.*

¹⁷⁹ UNIF. PROBATE CODE § 5-410 cmt. (2008).

Subsection [410](a)[1] gives the court the power to protect the assets of a minor by withholding distribution from the minor on attainment of majority when continued supervision of the assets is needed. Before ordering such a continuation, however, the court must be convinced, for reasons other than the minor's age, that a basis exists under Section 5-401(2) for the appointment of a conservator or other protective order.

Id.

¹⁸⁰ See Crusto, *supra* note 82, at 384–85 (discussing the general liability of the sole proprietor and asserting the need for extending limited liability principles to the sole proprietorship).

¹⁸¹ UNIF. P'SHIP ACT § 305(a).

¹⁸² See FED. R. CIV. P. § 17(c)(2).

¹⁸³ See generally Alan Newman, *The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise*, 69 TENN. L. REV. 771 (2002) (explaining creditor's rights to assets of a creditor held in trust from the benefit of the debtor).

¹⁸⁴ See UNIF. TRANSFERS TO MINORS ACT § 17(b) (1984) (limiting the liability of a custodian acting on behalf of the adolescent, unless the custodian personally

negligent failure of the guardian to supervise the activities of the adolescent or to negligently entrust assets to the minor¹⁸⁵; however, these statutes offer little protection given the nature of the entrepreneurial activity. For example, the adolescent could employ newly designed computer software to steal personal information, defraud users or cause harm to the computing device of the end user.¹⁸⁶ This presents a difficult situation for a plaintiff to prove a negligent entrustment of assets or, given the technical nature of the undertaking, make a case for failure to supervise the adolescent. These rules apply despite the material support or facilitation of the business activity that gave rise to the liability or obligation.

Employing an agency-based, partnership approach to the guardian-adolescent, entrepreneurial relationship provides for greater accountability for the activities of the business.¹⁸⁷ The adolescent and guardian (as partners) act as agents in support of the business activity,¹⁸⁸ thereby exposing each partner to personal liability.¹⁸⁹ The guardian is personally liable for debts and potentially liable for the tortious activities of the

commits tortious conduct). The majority of states base vicarious tort liability on willful or malicious acts of the adolescent, while only a few states allow for guardian liability based upon negligent acts. *See, e.g.*, ALA. CODE § 6-5-380 (1975) (stating parent or guardian may be liable when child causes intentional, willful or malicious destruction to real or personal property); ALASKA STAT. § 09.65.255 (2013) (stating liability may be imposed on a parent for a child's willful or malicious damage to real or personal property); CAL. CIV. CODE § 1714.1 (West 2008) (stating parents are jointly and severally liable for child's willful misconduct causing injury, death or property damage); WYO. STAT. ANN. § 14-2-203 (West 1977) (stating liability may be imposed on parent if a child willfully damages or destroys property).

¹⁸⁵ *See, e.g.*, ALA. CODE § 6-5-380 (providing an example of a state that holds guardian liability based upon negligence in supervising or entrusting assets to the adolescent); ALASKA STAT. § 09.65.255 (providing an example of a state that holds guardian liability based upon negligence in supervising or entrusting assets to the adolescent); CAL. CIV. CODE § 1714.1 (providing an example of a state that holds guardian liability based upon negligence in supervising or entrusting assets to the adolescent); WYO. STAT. ANN. § 14-2-203 (providing an example of a state that holds guardian liability based upon negligence in supervising or entrusting assets to the adolescent).

¹⁸⁶ *See* Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 241 (2007) (citing Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 231 (1967)). "[I]n many cases it may be the minor who is preying on unsuspecting, less-technologically savvy persons." *Id.*

¹⁸⁷ *See* Hansmann & Kraakman, *supra* note 153, at 390 (discussing the formation of legal entities). "[T]he essential role of all forms of organizational law is to provide for the creation of a pattern of creditors' rights—a form of 'asset partitioning'—that could not practicably be established otherwise." *Id.*

¹⁸⁸ UNIF. P'SHIP ACT § 301 (1997).

¹⁸⁹ *Id.* § 305(a).

business.¹⁹⁰ While the adolescent still enjoys a form of limited liability, the guardian is now accountable to the consumer or client of the business activity. This avoids a situation where the guardian acts with impunity in support of the adolescent's entrepreneurial activity that causes harm to a customer or client.¹⁹¹ Further, it closes off the possibility of a guardian carrying on a business in the name of the adolescent in an attempt to thwart personal accountability for debts, lawsuits, taxes, etc. In summary, viewing the relationship as a partnership, as opposed to a sole proprietorship, provides a great degree of accountability for the actions of those involved in the business activity and affords protection to customers of the entrepreneurial venture.

VII. CONCLUSION

Diverse legal standards apply to the guardian-adolescent entrepreneurial relationship. Laws governing the guardian-adolescent relationship conflict with the rules governing default business entities. Addressing the adolescent-guardian entrepreneurial relationship as a sole proprietorship creates inconsistencies that run counter to the need for established legal standards for the rights and accountability within an entrepreneurial activity. Interpreting the relationship as a default partnership brings the entrepreneurial activity within an established agency framework. The dual-agency role assumed by the guardian serves to protect the interests of all parties affected by the activity. This approach is consistent with the legal standards surrounding the guardian-adolescent relationship and the default rules governing business entities.

¹⁹⁰ *See id.*

¹⁹¹ This view assumes that the agency relationship is voluntary in nature and consistent with the right of the guardian to either act in support of the adolescents' entrepreneurial venture or halt it in its entirety.

